

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

CARLOS ANCHETA,

Plaintiff,

v.

GOLDEN EMPIRE MORTGAGE, INC., DBA  
GEM CAPITAL FUNDING, A CALIFORNIA  
CORPORATION; FIRST AMERICAN TITLE  
COMPANY, A CALIFORNIA  
CORPORATION; AURORA LOAN  
SERVICES, A BUSINESS ENTITY, FORM  
UNKNOWN; TUSCANA PROPERTIES, A  
BUSINESS ENTITY, FORM UNKNOWN;  
IBM LENDER BUSINESS PROCESS  
SERVICES, INC., A BUSINESS ENTITY,  
FORM UNKNOWN; MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS,  
INC., A DELAWARE CORPORATION; AND  
DOES 1 THROUGH 50, INCLUSIVE,

Defendants.

Case No.: 10-CV-05589-LHK

ORDER DISMISSING FEDERAL  
CLAIMS

I. Introduction

Defendants Golden Empire Mortgage, Inc., dba GEM Capital Funding (Golden Empire), First American Title Company, Aurora Loan Services (Aurora), Lexington Enterprises Group, Inc., dba Tuscana Properties, IBM Lender Business Process Services, Inc. (IBM), and Mortgage Electronic Registration Systems, Inc. (together, Defendants) move to dismiss the complaint in this action for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P.

12(b)(6). *See* Dkt. Nos. 9, 14, 17, 21, 24, 33. Plaintiff, proceeding pro se, submitted no opposition to these four Motions. The Court finds that this matter is suitable for decision without oral argument. Civil Local Rule 7-1(b). Accordingly, the hearing on these Motions, set for March 10, 2011, is hereby VACATED. Because the Court DISMISSES Plaintiff's complaint in part with leave to amend, the Case Management Conference set to follow the March 10, 2011 law and motion hearing is likewise VACATED. For the reasons set forth below, the complaint is DISMISSED in part with prejudice and DISMISSED in part with leave to amend.

## II. Background

Although the Complaint omits many relevant facts, the following information can be gathered from the parties' papers and requests for judicial notice. On March 1, 2006, Plaintiff Carlos Ancheta obtained a mortgage loan for \$388,000 secured by real property at 2038 Lunder Court, San Jose, California 95131 ("the Property"). Compl. ¶ 18. This primary loan was recorded with the Santa Clara County Recorder's office on March 1, 2006. *See* IBM's Request for Judicial Notice (IBM RJN, Dkt. No. 20, Att. 1) at Ex. 1 (Deed of Trust).<sup>1</sup> Plaintiff alleges, and the Deed of Trust shows, that Golden Empire was the lender under the loan.

On the same date that he obtained the Primary Loan, Plaintiff also obtained a Secondary Loan in the amount of \$97,000.00. *See* Compl. ¶ 18. Like the Primary Loan, the Secondary Loan was also secured by the Property. *Id.* Plaintiff states that "this complaint pertains to the First Mortgage." Compl. ¶ 18.

Plaintiff alleges very generally that "DEFENDANTS . . . neither explained the workings of the entire mortgage loan transaction, how the rates, finance charges, costs and fees were computed; nor the inherent volatility of the loan product(s) provided by DEFENDANTS." Compl. ¶ 39. Plaintiff further alleges that the loan was drafted and "explained (to the extent that any of it was actually explained) in English" but that Plaintiff's native language is Tagalog.

Plaintiff defaulted on at least the Primary Loan. A Notice of Default was recorded on April 7, 2009. *See* IBM RJN, Ex. 2. On July 9, 2009, a Notice of Trustee's Sale relating to the Deed of

<sup>1</sup> Defendants make an unopposed request that the Court take judicial notice of a number of documents recorded in the Santa Clara County Recorder's Office. Because these are public records, they are judicially noticed pursuant to Fed. R. Evid. 201(b).

1 Trust securing the Primary Loan was recorded. *See* IBM RJN, Ex. 4. A Trustee's Deed Upon Sale  
2 was recorded on October 14, 2010, reflecting that the Property was sold at public auction on March  
3 11, 2010. *See* IBM RJN, Ex. 5.

4 On October 25, 2010, Plaintiff filed the underlying Complaint in the Superior Court for  
5 Santa Clara County. On December 9, 2010, the Defendant Aurora Loan Services removed the  
6 Complaint to this Court on the basis of original federal jurisdiction over the claims arising under  
7 federal law. *See* Not. of Removal (Dkt. No. 1).

### 8 III. Legal Standard

9 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if  
10 it fails to state a claim upon which relief can be granted. To survive a motion to dismiss, the  
11 plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl.*  
12 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "facial plausibility" standard requires the  
13 plaintiff to allege facts that add up to "more than a sheer possibility that a defendant has acted  
14 unlawfully." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). In deciding whether the plaintiff has  
15 stated a claim, the Court must assume the plaintiff's allegations are true and draw all reasonable  
16 inferences in the plaintiff's favor. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).  
17 However, the court is not required to accept as true "allegations that are merely conclusory,  
18 unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536  
19 F.3d 1049, 1055 (9th Cir. 2008). Leave to amend must be granted unless it is clear that the  
20 complaint's deficiencies cannot be cured by amendment. *Lucas v. Dep't. of Corrections*, 66 F.3d  
21 245, 248 (9th Cir. 1995).

22 "[A] district court should grant leave to amend even if no request to amend the pleading  
23 was made, unless it determines that the pleading could not possibly be cured by the allegation of  
24 other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (quoting *Doe v. United States*, 58  
25 F.3d 494, 497 (9th Cir. 1995)). In addition, the "rule favoring liberality in amendments to  
26 pleadings is particularly important for the pro se litigant. Presumably unskilled in the law, the pro  
27 se litigant is far more prone to making errors in pleading than the person who benefits from the  
28 representation of counsel." *Id.*, 203 F.3d at 1131.

1 IV. Application

2 The Complaint alleges twenty-nine causes of action against all defendants, often without  
3 distinguishing between the actions of different defendants in the various causes of action. The  
4 moving defendants seek to dismiss all twenty-nine causes of action. Plaintiff has failed to oppose  
5 defendants' Motions or to file a statement of nonopposition as required by Civil Local Rule 7-3(b).

6 Of the twenty-nine causes of action alleged, only ten claims implicate federal law. The  
7 Court will consider only the asserted federal causes of action in this Order. Unless Plaintiff can  
8 amend these federal causes of action to state a claim, the remaining claims arising under state law  
9 will be remanded to state court.

10 a. 11 U.S.C. § 544

11 The only reference to a federal law in plaintiff's third claim is to 11 U.S.C. § 544, a section  
12 of the federal Bankruptcy Code. Plaintiff titles his third claim "California Commercial Code  
13 § 9313." Under this claim, Plaintiff alleges that "[p]rior to the commencement of this case, the  
14 Deed of Trust was transferred from GOLDEN to AURORA. PLAINTIFF alleges on information  
15 and belief that no trustee was a holder in due course, and did not deliver to QUALITY or any  
16 successor trustee the original promissory note." Compl. ¶ 125. Plaintiff alleges that these actions  
17 violated California Commercial Code § 9313. As a result, Plaintiff states that the "unperfected  
18 security interest of DEFENDANT is void as to PLAINTIFF by virtue of 11 U.S.C. § 544." Compl.  
19 ¶ 127. The Court does not believe Plaintiff's third claim attempts to state a claim for violation of  
20 11 U.S.C. § 544. If it does, Plaintiff has failed to allege sufficient facts explaining how such a  
21 claim would arise. Accordingly, this claim is DISMISSED without prejudice. Should the Plaintiff  
22 attempt to re-assert this claim, he must clarify whether he intends to prove a violation of 11 U.S.C.  
23 § 544 and upon what facts he alleges this claim is based. Failure to do so will result in dismissal  
24 with prejudice.

25 b. TILA

26 Plaintiff alleges or makes references to Truth In Lending Act (TILA, 15 U.S.C. § 1601 et  
27 seq.) violations in his fifth, ninth, twelfth, and twenty-eighth claims. Generally, Plaintiff states that  
28 Golden Empire understated the finance charge relating to the Primary Loan. However, Plaintiff

1 does not specify by how much the finance charge was understated. *See* Compl. ¶ 165. Plaintiff  
 2 also asserts that his TILA claims should be equitably tolled, because “the representative at  
 3 GOLDEN painted a very rosy picture for Plaintiff” and that “[i]t wasn’t till only recently when  
 4 PLAINTIFF’S payments changed dramatically that they realized what they had gotten themselves  
 5 into.” Compl. ¶ 138. In these claims, Plaintiff asserts a right to damages and rescission under  
 6 TILA.<sup>2</sup> However, based on the claims as currently pled, it appears that Plaintiff is time-barred  
 7 from seeking either remedy.

8 i. TILA damages

9 TILA damages claims are subject to a one-year statute of limitations, which generally runs  
 10 from the date the loan documents are executed. 15 U.S.C. § 1640(e); *See Meyer v. Ameriquest*  
 11 *Mortg. Co.*, 342 F.3d 899, 902 (9th Cir. 2003). Plaintiff’s Primary Loan was signed March 1,  
 12 2006. But Plaintiff did not file his Complaint until October 25, 2010, over four years and seven  
 13 months after the Primary Loan was signed. Therefore, it appears that Plaintiff’s claim for TILA  
 14 damages is time-barred. The one-year bar may be tolled. However, to show that tolling is  
 15 appropriate, the Plaintiff would need to establish that he could not have discovered his claims  
 16 before he brought them despite using reasonable diligence. *See Meyer*, 342 F.3d at 902. Plaintiff  
 17 would need to establish “evidence of undisclosed credit terms, or of fraudulent concealment or  
 18 other action on the part of [the loan originator] that prevented” him from discovering his claim. *Id.*  
 19 As pled, the Complaint does not establish a sufficient basis for equitably tolling Plaintiff’s TILA  
 20 damages claims. Although the Plaintiff asserts that his claims should be tolled because it was not  
 21 until his payments “changed dramatically” that he realized “what [he] had gotten [himself] into,”  
 22 this is not sufficient to establish that the claims should be equitably tolled from the presumptive  
 23 deadline of March 1, 2007 to the filing date of October 25, 2010. This is particularly true since  
 24 Plaintiff apparently defaulted on the Primary Loan as of April, 7, 2009; surely by that point, the  
 25 Plaintiff became aware of loan terms such as the finance charge. The Ninth Circuit disfavors  
 26 granting motions to dismiss when equitable tolling is at issue. *Supermail Cargo v. United States*,

27 <sup>2</sup> The Complaint also references Regulation Z. Regulation Z is the TILA implementing regulation.  
 28 For ease of reference, the Court refers only to TILA, but the Court has also considered Plaintiff’s  
 claims relating to Regulation Z.

68 F.3d 1204, 1206 (9th Cir. 1995). Therefore, Plaintiff's fifth and ninth claims, which pray for damages as a result of TILA violations, are DISMISSED with leave to amend to establish a basis for equitably tolling such a claim. Failure to sufficiently allege facts supporting equitable tolling of this claim will lead to a dismissal with prejudice.

#### ii. TILA Rescission

Plaintiff also asserts a right to TILA rescission in his fifth, ninth, twelfth, and twenty-eighth claims. The TILA rescission right expires when the property in question is sold. *See* 15 U.S.C. § 1635 ("An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first."). IBM has submitted a recorded Deed of Sale showing that ownership of the property transferred from Plaintiff to the Federal National Mortgage Association in October, 2010. Therefore, it appears that Plaintiff has no right of rescission. Accordingly, Plaintiff's fifth, ninth, twelfth and twenty-eighth claims are DISMISSED with prejudice to the extent that they seek rescission under TILA, as any amendment would be futile. *See Lucas v. Dep't. of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995).

#### c. FACTA

Plaintiff's eleventh claim alleges violation of section 212 of the Fair and Accurate Credit Transaction Act of 2003 ("FACTA"), Pub. L. 108-159, 111 Stat. 1952 (2003), which amended the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq. Plaintiff alleges that his credit score was never disclosed as required by § 212(b) of FACTA. Compl. ¶ 175. Claims for FACTA violations must be brought within "2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability." 15 U.S.C. § 1681p. Other district courts have found that FACTA claims presumptively accrue on the date of the loan transaction, because it should be clear on this date whether or not a credit score disclosure is made. *Hawkins v. First Horizon Home Loans*, No. S-10-1876 FCD/GGH, 2010 U.S. Dist. LEXIS 124529 at \*18-19 (E.D. Cal. Nov. 22, 2010). The non-disclosure alleged in Plaintiff's FACTA claim is similar to the non-disclosures often asserted in TILA claims. Accordingly, the Court finds it appropriate to apply the Ninth Circuit's equitable tolling doctrine from the TILA context. *See Hawkins*, 2010 U.S. Dist. LEXIS 124529 at \*18. In order to equitably toll the FACTA violation, the Plaintiff must present some

“evidence of undisclosed credit terms, or of fraudulent concealment or other action on the part of [the loan originator] that prevented” him from discovering his claim. *See Meyer*, 342 F.3d at 902. As currently pled, Plaintiff’s FACTA claim appears to be time-barred. Accordingly, this claim is DISMISSED with leave to amend. Failure to sufficiently allege facts supporting equitable tolling of this claim will lead to a dismissal with prejudice.

d. RESPA

i. 12 U.S.C. § 2603

Plaintiff’s tenth cause of action asserts violations of the Real Estate Settlement Procedures Act of 1974 (RESPA, 12 U.S.C. 2601 et seq.).<sup>3</sup> In this claim, Plaintiff alleges that he “never received a Settlement Statement prior to close of escrow” and that this failure “triggers an Extended Right to Rescind.” Compl. ¶ 171 (emphasis in original). First, many courts in this district have found that there is no implied private right of action under 12 U.S.C. § 2603 (unlike some other sections of RESPA which explicitly grant private rights of action). *See Bloom v. Martin*, 865 F. Supp. 1377, 1384-85; *Hawkins*, 2010 U.S. Dist. LEXIS 124529 at \* 17 (citing multiple cases finding no implied private right of action under this section of RESPA). However, the Court finds it unnecessary to reach this question because the Plaintiff has asserted only a right to rescission under this claim. As described above, however, Plaintiff’s property was sold in 2009; therefore, Plaintiff’s loan no longer exists, and there is nothing to rescind. It appears that this claim is fatally flawed and cannot be cured through amendment. Therefore, this claim is DISMISSED with prejudice.

ii. 12 U.S.C. § 2607

Plaintiff’s twenty-first and twenty-fourth causes of action refer to violations of RESPA, 12 U.S.C. § 2607. This section prohibits charges other than for services actually rendered. *Id.* The Ninth Circuit has adopted the two-part test set forth by the Department of Housing and Urban Development (HUD) to determine whether or not a fee violates this section of RESPA. *See Geraci v. Homestreet Bank*, 347 F.3d 749, 751 (9th Cir. 2003). This test asks “(1) ‘whether goods or

<sup>3</sup> The Complaint also references Regulation X. Regulation X is the RESPA implementing regulation. For ease of reference, the Court refers only to RESPA, but the Court has also considered Plaintiff’s claims relating to Regulation X.



1 facilities were actually furnished or services were actually performed for the compensation paid’  
 2 and if so, (2) ‘whether the payments are reasonably related to the value of the goods or facilities  
 3 that were actually furnished or services that were actually performed.’”. *Id.* (citing HUD’s  
 4 Statements of Policy, Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10080 (Dep’t of  
 5 Housing & Urban Dev., March 1, 1999). Although Plaintiff sets forth this two-part test in the  
 6 Complaint, he has failed to allege any specific facts to support such a claim.

7 Although Plaintiff states that he was charged a Yield Spread Premium (YSP), and states in  
 8 conclusory fashion that this YSP caused unjust enrichment to Defendants and violated RESPA,  
 9 Plaintiff does not specify what YSP fees he was charged. In addition, it appears likely that  
 10 Plaintiff’s claim for RESPA violations is time-barred. The section of RESPA relating to Yield  
 11 Spread Premiums and other fees has a one-year statute of limitations, which runs “from the date of  
 12 occurrence of the violation.” *See* 12 U.S.C. § 2614. Plaintiff alleges that his loan closed on March  
 13 1, 2006. *See* Compl. ¶ 18. Plaintiff has failed to allege any basis for equitably tolling this claim.  
 14 Although the Ninth Circuit has not decided whether or not equitable tolling applies to RESPA  
 15 claims, the Court applies the principles announced by the Ninth Circuit regarding equitable tolling  
 16 of TILA claims. *See Brewer v. Indymac Bank*, 609 F. Supp. 2d 1104, 1117-1118 (E.D. Cal. 2009).  
 17 “Equitable tolling may be applied if, despite all due diligence, a plaintiff is unable to obtain vital  
 18 information bearing on the existence of his claim.” *Santa Maria v. Pacific Bell*, 202 F.3d 1170,  
 19 1178 (9th Cir. 2000). Plaintiff has failed a state a claim for violation of the fee provision of  
 20 RESPA, and has failed to allege facts supporting equitable tolling of such a claim. Moreover,  
 21 Plaintiff did not oppose the defendants’ various motions to dismiss these claims. Therefore, claims  
 22 twenty-one and twenty-four are DISMISSED. Because it might be possible to equitably toll this  
 23 claim, the Plaintiff is given leave to amend. Failure to sufficiently allege the facts underlying this  
 24 claim (for example, the imposed fees that allegedly violated RESPA) or to allege facts supporting  
 25 equitable tolling of this claim will lead to a dismissal with prejudice.

#### 26 e. RICO

27 Plaintiff’s fourteenth claim asserts violations of California’s Unfair Competition Law based  
 28 in part on predicate violations of “Federal R.I.C.O. statutes.” Presumably, Plaintiff intends to



reference sections 1962 (c) and (d) of the Racketeer Influenced and Corrupt Organizations Act (RICO). Without distinguishing between defendants, Plaintiff alleges that they worked “closely together” and that “there are ‘predicate acts’ of” mail fraud, wire fraud, deceit, securities fraud, loss of profit opportunity, false statements, and “stripping the originator/issuer of the ability to pay debt claims or Judgment claims in bankruptcy court.”. Compl. ¶ 200-201. This claim appears to have been drafted very generally, without reference to any specific facts relating to Plaintiff’s experience. There are no specific facts indicating how Plaintiff was defrauded, or by which defendant(s).

Plaintiff’s claims do not come close to satisfying the heightened pleading requirements for RICO and fraud claims. *See* Fed. R. Civ. P. 9(b). Rule 9(b) “requires a pleader of fraud to detail with particularity the time, place, and manner of each act of fraud, plus the role of each defendant in each scheme. The Ninth Circuit has repeatedly insisted that this rule be followed in RICO actions alleging the predicate act of mail fraud.” *Lancaster Community Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991) (internal citations omitted). Plaintiff has not stated a claim for RICO violations in his fourteenth claim. Accordingly, this claim is DISMISSED. Plaintiff is given leave to amend this claim, if he can specifically identify the allegedly fraudulent acts and actors giving rise to a RICO violation. Failure to do so will lead to dismissal with prejudice.

#### f. HOEPA

In Plaintiff’s twenty-eighth claim, he alleges wrongful foreclosure under California law. Plaintiff alleges that “Defendants knew or should have known that pursuant to the mandatory provisions of TILA, HOEPA, and Regulation Z, the Notice of Trustee’s Sale were rendered null and void for all purposes, by operation of law, by the TILA Rescission Notice, and there was no Notice of Trustee’s sale legally in existence upon which to foreclose and that DEFENDANTS were legally barred and prohibited from conducting a Nonjudicial Foreclosure of the Loans, Notes, and Trust Deeds . . . .” Compl. ¶ 288. As discussed above, Plaintiff’s TILA claims appear to be time-barred, and Plaintiff is not entitled to TILA rescission as the Property has already been sold. As previously noted, Regulation Z is the TILA implementing regulation. The only federal claim

1 referenced in this cause of action and not yet addressed in this Order, then, is HOEPA. Plaintiff  
2 does not identify any HOEPA provision allegedly violated, and does not state what acts of which  
3 defendants allegedly violated HOEPA. This pleading is simply too vague to state a claim. The  
4 Complaint must “meet some minimum threshold in providing a defendant with notice of what it is  
5 that it allegedly did wrong.” *Brazil v. United States Dept. of Navy*, 66 F.3d 193, 199 (9th Cir.  
6 1995). Accordingly, this claim is DISMISSED with leave to amend. If Plaintiff intends to state a  
7 claim for violation of a provision of HOEPA, he must identify what section or sections of the law  
8 were violated, and by what acts of which specific defendants. Failure to do so will lead to  
9 dismissal with prejudice.

10 V. Conclusion

11 Plaintiff’s Complaint is DISMISSED in part with prejudice and DISMISSED in part with  
12 leave to amend. Plaintiff must submit any amended complaint, amending his remaining federal  
13 claims as specified in this Order, **within 21 days of the date of this Order**. Plaintiff may not add  
14 new causes of action or parties without leave of Court or by stipulation of the parties pursuant to  
15 Federal Rule of Civil Procedure 15. If Plaintiff fails to amend, or his amendment fails to cure the  
16 deficiencies set forth herein, his remaining federal claims will be DISMISSED with prejudice, and  
17 the remaining state claims will be remanded to the Superior Court for Santa Clara County.

18 **IT IS SO ORDERED.**

19 Dated: March 7, 2011

20   
21 LUCY H. KOH  
22 United States District Judge  
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